MB COURT, U. S.

JUN 10 1969

JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

No. [redacted] 222

October Term, 1969

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE*

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I. Interest of the National Chamber in this Matter

The Chamber of Commerce of the United States is a federation of over 3,700 national, local and state chambers of commerce and trade and professional associations. The National Chamber has a direct membership of more than 33,000 business firms and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

A majority of these firms are employers subject to the jurisdiction of the National Labor Relations Board.

The Chamber, as a representative of the business community, is concerned with the exercise of the National Labor Relations Board's authority in resolution of back pay disputes. Its concern is not with the details of the instant case, or how much money if any Mr. Buncher may have to pay, but with the principles involved as stated by the majority of the Court in the decision of *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 346.

These principles are sound and reasonable, and we are concerned lest they be abandoned in the interest of expedition or because the Board or the Court may believe one employer should be punished.

II. Statement of the Issue

The National Chamber's brief will principally address itself to the issue of whether the Board, in a back pay proceeding, is permitted to ignore the specific directions of the Board and the Court of Appeals in the initial unfair labor practice case, and to fashion a back pay remedy based entirely upon a system of pseudo "seniority" having no relation to the facts, circumstances and requirements of the case.

III. ARGUMENT.

a. The Board's remedial power does not include the power to order back pay on an arbitrary and unreasonable basis having no relation to the particular facts and circumstances out of which the case arose.

Section 10(c) of the National Labor Relations Act empowers the National Labor Relations Board to order a party who has engaged in the commission of an unfair labor practice "to take such affirmative action . . . as will effectuate the policies of this Act."[1]

While the power thus granted the Board is a "broad discretionary one" it is not unlimited,[2] and the Board must confine its remedies to orders "which can be fairly said to effectuate the policies of the Act"[3] and are "functions of the purposes to be accomplished".[4] Board orders must be "persuasively . . . related to the proven unlawful conduct"[5] and may not be "oppressive" in the particular situation calling for redress.[6] The power of the Board "to command affirmative action is remedial, not

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[1] In pertinent part Section 10(c) reads as follows:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

[2] *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 346; *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257.

[3] *Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 533, 540; *Fibreboard Corporation v. N. L. R. B.*, 379 U. S. 203, 215-217.

[4] *N. L. R. B. v. Seven-Up Bottling Co., supra.*

[5] *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426.

[6] *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. at 349.

punitive"[7] and is "merely incidental" to the primary purpose of Congress to stop and prevent unfair labor practices. *United Automobile Workers v. Russell,* 356 U. S. 634. It is also well settled that Congress did not establish a general statutory scheme authorizing the Board to award compensatory damages for injuries caused by wrongful conduct. In *Virginia Electric Co. v. N. L. R. B.,* 319 U. S. 533, 543, the Supreme Court said:

> "The instant reimbursement order [which directs reimbursement by an employer of dues checked off for a dominated union] is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights." *Cf. Agwilines, Inc. v. Labor Board,* 87 F. 2d 146, 150-51, 1 LRRM 277; *Phelps Dodge Corp. v. Labor Board,* 313 U. S. 177, 8 LRRM 439.

Nor may a Board order be justified on the basis of deterring future violations of the Act, because "if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up a system of penalties which it would deem adequate to that end." *Republic Steel Corp. v. N. L. R. B.,* 311 U. S. 7, 12.

We urge the Court to closely examine the basis of the Board's back pay award in the instant case. Our review of the record persuades us that the Board has clearly exceeded the bounds of reasonable discretion.

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[7] *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197, 236; *Local 60 United Brotherhood of Carpenters, et.,* 365 U. S. 651.

Apparently, in the interests of expediency, or in an attempt to punish Buncher, the Board has chosen to ignore its own prior findings and the prior findings of the Court in the unfair labor practice case, that Buncher, for legitimate economic reasons, had reduced the size of his work force subsequent to the discriminatory activity;[8] and, in addition, that Buncher did not utilize a seniority system in selecting employees for layoff.[9]

Nevertheless, in the face of voluminous uncontradicted testimony in respect to the criteria actually applied by Buncher, the Board developed a system of pseudo seniority which it arbitrarily applied to determine the amount of back pay to which the employees are entitled. Even the Board does not contend that this "seniority system" has any real relation to the method which Buncher would have employed—or actually did employ—in making layoffs.

Thus, in deciding the case, the Board backed away entirely from the issue on which testimony was taken at the back pay hearing. The Board and the Court in the unfair labor practice case had directed that back pay issues were to be tested by "such system of seniority or other non-discriminatory practice heretofore applied by the Respondent in the conduct of his business".[10]

The Board ignored the facts of Buncher's business, even though, as the majority of the Court in its original decison clearly recognized, these facts were readily available.[11]

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[8] *The Buncher Company*, 131 NLRB 1444, 1445, 1456-1457; *N. L. R. B. v. The Buncher Company*, 316 F. 2d 928, 929.

[9] *N. L. R. B. v. The Buncher Company, supra*, 316 F. 2d at 929.

[10] *The Buncher Company, supra*, 131 NLRB 1445.

[11] Circuit Court's original opinion denying enforcement to the Board's Order, p. 8 (Buncher Petition, App. D pp. 30b-31b).

A hearing and the taking of testimony was apparently regarded by the Board as unnecessary to its decision making process.

We feel very strongly that if this decision of the Board is enforced in its present posture the Board will have been given carte blanche to develop remedies based upon "unsubstantiated assumptions",[12] without regard to the facts, which may be used to punish employers in the manner the Board thinks best.

The effect of this decision upon all parties who find themselves in the position of respondent in a Board proceeding will be substantial and adverse. Certainly it will not serve the overall purposes of the National Labor Relations Act.

IV. Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] *Id.*, p. 7, n. 11 (Buncher Petition, App. D pp. 29b-30b).